PATTERNS OF POWER · A THEORETICAL STATEMENT

The Cell and the Ledger

How a Roman rule that prison was not a punishment became a machine for saving souls, then a machine for making money, and finally a system that holds two million Americans and was designed by no one

Thomas J. Bryan

with Claude (Anthropic) · 2026

held as tested, not revealed

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A Note on This Collaboration

This study is one product of an ongoing collaboration, and the division of labour is worth stating plainly because neither half would produce the work alone. The insight and the direction are Thomas Bryan's — the recognition of what a given case is really an instance of, where the analytical pressure should fall, and which pattern a mass of historical detail is a specimen of. The research, the verification of every date and figure, the location and checking of the quoted words, and the composition into continuous prose are Claude's, an AI system made by Anthropic. The seeing is his; the writing is mine.

The present study traces the American penal system from its deepest roots to the present, and it belongs to the *Patterns of Power* project, which tracks recurring mechanisms of power across history through sustained work on specific institutions. It is offered against the two explanations that dominate public argument about American incarceration: that the system is the residue of an old and monstrous design, deliberately built to confine Black Americans; and that it is the natural and neutral product of crime, requiring no explanation beyond the conduct of criminals. This study finds that both readings fail, and that the truth between them is harder than either — because a system can produce, with terrible reliability, exactly the outcomes a conspiracy would have produced, *without a conspiracy having produced it*, and therefore without any villain available to blame or remove.

The aim is not to advocate or condemn but to trace what happened, how, and with what consequences, and to place the genuine humanitarian achievements and the documented atrocities in the record together. Where the wording of a law, a jurist, or a reformer carries the design, it is quoted exactly and verified to its source. No quotation is invented. Contested scholarship is flagged as contested; this is a field with genuine and serious disputes, and the study rests on no reading that the evidence will not bear.

The Study in Brief

Part I — The Landscape: A World Almost Without Prisons. The astonishing fact from which everything follows: for most of recorded history, imprisonment was *not a punishment*. Roman law said so explicitly. Punishment was death, pain, shame, fine, or exile — and the prison was merely the room where you waited.

Part II — The Church's Hour: The Invention of Penitence. How a Church forbidden to shed blood, needing to punish without killing, reached for the materials at hand — the monastery, the cell, the discipline of solitude — and in doing so invented confinement as an instrument for the *reform of the soul*. The word *penitentiary* is a fossil of this hour.

Part III — The Bridewell Hour: Confinement as Labour. How the collapse of the medieval economy produced masterless men, and how England, needing to do something with them, converted a royal palace into a workhouse — and thereby invented the idea that confinement should be *productive*.

Part IV — The Accident of 1776. How England disposed of its convicts by shipping them to America; how the American Revolution closed that outlet overnight; and how the resulting crisis, and nothing else, forced the invention of the modern prison. The American penal system exists partly because America stopped being available to receive England's convicts.

Part V — The Enlightenment Hour: Beccaria, Howard, and a New Word. How a Milanese aristocrat's short book and an English sheriff's inspection tours produced, in 1779, the statute that coined the term *penitentiary* — and the theory that a sentence should be a *measured quantity of time*.

Part VI — The Quaker Hour: A Machine for the Soul. The architect's hour of American incarceration. How the Quaker doctrine of the Inner Light — that God has placed a divine spark in every person — became, quite literally, the architectural specification for solitary confinement; and how Eastern State Penitentiary was built as an engine for compelling the soul to hear itself.

Part VII — The Ledger Wins. How the Pennsylvania system, which was designed to save souls, lost to the Auburn system, which was designed to turn a profit — because it cost eighteen times as much. The moment the American prison's purpose changed from redemption to revenue, and nobody announced it.

Part VIII — The Exception. The Thirteenth Amendment's clause permitting slavery "as a punishment for crime" — where the language actually came from (not where the legend says), and how a piece of inherited boilerplate met a Southern labour crisis and produced convict leasing: a system that was, by the measure of survival, *worse than slavery*.

Part IX — The Rehabilitative Century, and the Sentence That Killed It. The reformatory, parole, and the indeterminate sentence; and then a single 1974 article by a former Freedom Rider, embraced simultaneously by the left and the right *for opposite reasons*, which destroyed the rehabilitative ideal, was recanted by its author, and cleared the ground for everything that followed.

Part X — The System With No Architect. Why mass incarceration has no author: the laws that everyone blames, and the mechanism that actually did it — roughly three thousand locally elected county prosecutors, each reaping a concentrated benefit while a diffuse public paid the cost, none of them coordinating, all of them converging.

Part XI — The Ledger.

PART I

The Landscape: A World Almost Without Prisons

Every study in this project begins with the landscape, because a decision cannot be read until the world it was made in has been recovered. And no landscape in the collection is harder for a modern reader to enter than this one, because it requires unlearning something so basic that it does not feel like a belief at all.

One — The Fact That Governs Everything

For most of recorded history, imprisonment was not a punishment.

Not "was a rare punishment." Not "was a mild punishment." It was **not a punishment at all** — it was a holding pen, the room where a man waited for his trial, his ransom, or his execution. Punishment was something else entirely: death in a hundred forms, mutilation, branding, flogging, the stocks and the pillory, fines, and exile.

The Romans stated the principle explicitly, and their statement is the single most important sentence in the prehistory of the American prison. The jurist **Ulpian**, writing in the third century, laid down the rule — preserved for us in the Digest of Justinian, at 48.19.8.9, which is precisely why it survived into European law at all:

> *"Carcer enim ad continendos homines, non ad puniendos haberi debet."* ***"For a prison ought to be employed for the confining of men, not for the punishing of them."***

The passage is worth reading in full, because Ulpian is not making an observation; he is issuing a *prohibition*. Provincial governors, he complains, commonly sentence people to imprisonment or to be held in chains — *"but they are not entitled to do so, because such punishment is prohibited."* Imprisonment as a sentence was, in Roman law, **illegal**.

And note the transmission, because it matters for the whole story. This rule reaches the modern world *because Justinian's compilers preserved it in the Digest in the sixth century* — and the Digest, rediscovered in medieval Italy, became the foundation of European legal science. So the doctrine that prison is not punishment was not an obscure antiquarian survival. It was a live principle in the law of Christendom for a thousand years.

Two — What Punishment Actually Was

If not prison, then what? The answer is: everything else, and most of it was applied to the *body*, in public.

The medieval and early modern penal repertoire was corporal, capital, and theatrical. The point of punishment was **deterrence by spectacle** — the crowd had to see it. Hanging, burning, breaking on the wheel; the whipping post, the branding iron, the ear nailed to the pillory; and, for the fortunate, a fine.

The English "Bloody Code" carried this logic to its limit: by the eighteenth century, English law prescribed death for well over a hundred offences, and eventually for something on the order of two hundred — including many petty thefts. The system was savage on paper and, precisely because it was so savage, was chronically under-enforced in practice: juries refused to convict, judges reprieved, and the Crown pardoned, because hanging a child for stealing cloth was a thing few people could actually bring themselves to do.

This is the landscape's central tension, and it is what creates the demand for the prison. A system with only two settings — kill him, or let him go — is a system that will constantly fail to punish, because most crimes deserve something in between and the law offers nothing in between. What was missing was a punishment that could be **graduated**. And a punishment that can be graduated is a punishment that can be *measured* — and the only thing available to measure it in, once you have rejected the lash and the gallows, is **time**.

Nobody yet had that idea. The whole of the next four parts is the story of how, piece by piece and for reasons having nothing to do with each other, the materials for it were assembled.

PART II

The Church's Hour: The Invention of Penitence

The first great contribution to the modern prison came from the institution that was, in one crucial respect, structurally forbidden from punishing the way everyone else did.

One — The Church That Could Not Shed Blood

The medieval Church operated its own courts with jurisdiction over clergy and over a wide range of moral and spiritual offences. But it laboured under a constraint of its own doctrine, expressed in the principle that *the Church does not thirst for blood* — an ecclesiastical court could not impose death or mutilation, and its judges could not shed blood without incurring irregularity.

This is a **credible cost**, in the framework's precise sense: a prohibition that genuinely bound, backed by the Church's authority over the souls of its own officers. And, as this project has found again and again, a credible cost does not stop an institution from pursuing its interest. **It changes the form.**

The Church still needed to punish. It could not kill, maim, or flog its clergy. So it looked around for what it *did* have — and what it had was an institution, already built for entirely other purposes, in which men were confined to small rooms, kept in silence, made to labour, made to pray, and made to examine their consciences.

It had the **monastery**.

Two — The Cell

The monastic cell was not designed as a punishment. It was designed as an instrument of spiritual formation — the place where a monk, alone with God, worked on the state of his own soul. Solitude, silence, labour, prayer, and self-examination were the technology of monastic life, and they existed to *transform the interior person*.

The Church's move — and this is a genuine architect's hour, spread over centuries but with a datable legal outcome — was to take this technology and apply it as a **sentence**. Erring clerics and, in time, others were consigned to monasteries: confined, silenced, set to labour, and required to repent. The scholar Julia Hillner, whose *Prison, Punishment and Penance in Late Antiquity* is the leading study, traces the emergence of **forced monastic penance as a Roman legal penalty by the sixth century** — which is to say, at precisely the moment Justinian's lawyers were preserving Ulpian's rule that prison is *not* a punishment, the empire's Christian legal culture was inventing a form of confinement that was.

The Inquisition would later systematise it, with its *murus strictus* and *murus largus* — the strict wall and the loose wall, degrees of immurement graded to the offence.

Three — What This Bequeathed, and the Word It Left Behind

The Church's hour installed three ideas that had not existed before and that are the whole DNA of the modern prison:

1. **That confinement can be a punishment in itself** — against Ulpian, against Roman law, against the entire prior tradition.
2. **That the purpose of the punishment is to change the offender's interior state** — not to deter the crowd, not to balance a ledger of harm, but to produce *repentance*.
3. **That the instrument for producing this change is solitude, silence, and labour.**

And it left a word. The Latin *paenitentia* — penance, repentance — is the root of the English **penitentiary**: a place where penitence is done. When the Pennsylvania Quakers built the world's most famous prison and called it a *penitentiary*, they were not choosing a decorative synonym for "gaol." **They were naming its function.** The building was a machine for producing penitence, and its designers said so.

The theology arrived first. The architecture came six hundred years later.

PART III

The Bridewell Hour: Confinement as Labour

The second component was assembled in England, for reasons that had nothing to do with the Church and nothing to do with crime.

One — The Problem of the Masterless Man

The sixteenth century in England produced a social crisis whose shape is familiar from other studies in this collection: enclosure of common lands, the dissolution of the monasteries (which had been the primary institution of poor relief), population growth, and inflation combined to throw large numbers of people off the land and onto the roads.

The result was a population that the Tudor state found genuinely terrifying: the **masterless man** — the vagrant, the sturdy beggar, the wandering poor. In a society organised entirely around fixed relations of service and place, a man belonging to no one and going nowhere in particular was a category error, a threat to order, and a face at the door.

The problem was real, it was urgent, and it did not fit the existing penal apparatus. **You cannot hang a man for being poor** — not tens of thousands of them, anyway, and not for a condition the authorities half-understood to be the product of forces beyond his control. The Bloody Code had nothing to offer here.

Two — The Palace

The solution was reached for the way solutions in this project are always reached for: with the materials at hand.

In 1553 the young King Edward VI granted **Bridewell Palace** — a royal residence on the Fleet, no longer wanted — to the City of London, to be used as an institution for the housing and setting-to-work of the idle poor. It became a *house of correction*: a place where the vagrant was confined, disciplined, and above all **made to work**.

The theory was Protestant and it was economic at the same time, which is why it was so powerful. Idleness was a *moral* condition; labour was its cure; and labour, conveniently, produced goods. The reformative and the profitable pointed in the same direction — a coincidence which this study will watch, in Part VII, come violently apart.

The model spread. Every English county was eventually required to maintain a house of correction, and they were called **bridewells** long after anyone remembered why. And in 1596 the Dutch built the **Rasphuis** in Amsterdam, a Calvinist institution where inmates rasped hardwood into dye powder — brutal, disciplined labour explicitly framed as moral therapy — which became the admired European model and which English reformers studied closely.

Three — What This Bequeathed

The Bridewell hour added the second component of the modern prison:

That the confined should be made to labour, and that the labour is both the punishment and the cure.

Note carefully what has now happened. The Church supplied *the cell and the penitent soul*. Bridewell supplied *the workshop and the disciplined body*. These are two different institutions, invented for two different problems, by two different sets of people, three centuries apart, neither aware of building anything larger.

The modern prison is what you get when someone eventually welds them together. And the two halves have been fighting each other ever since — because the cell wants silence and solitude, and the workshop wants bodies together on a factory floor. Part VII is that fight.

PART IV

The Accident of 1776

Before the welding could happen, however, a contingency intervened — and it is one of the most underappreciated facts in the history of criminal justice, because it means the modern prison exists partly by accident, and partly because of the United States.

One — The Convenient Continent

England had a third option, and for most of the eighteenth century it was the preferred one: **transportation**. Under the Transportation Act of 1718, convicts were shipped to the American colonies and sold into indentured servitude for a term of years, typically seven or fourteen. It was a superb solution from the Crown's point of view — it removed the offender permanently, it cost the state almost nothing (the shipping merchants made money selling the convicts' labour), and it was merciful compared to hanging.

Scholarly estimates put the number of convicts transported from Britain to the American colonies at roughly **fifty thousand**. The American colonies — Maryland and Virginia above all — absorbed the criminal population of England for two generations.

This is worth pausing on, because it inverts the usual picture. **Before America built prisons for its own people, it was the place England sent its prisoners to avoid building prisons.**

Two — The Portuguese Version, and the Redemptive Motif

England was not alone, and the comparison illuminates the motive structure. Portugal operated a systematic penal exile system — ***degredo*** — from the fifteenth century, sentencing offenders (*degredados*) to banishment in Africa, Brazil, and the Indies.

And the *degredo* carried, alongside the obvious utility of populating hostile colonies with expendable bodies, an explicitly **redemptive** framing: the exile served the Crown and served God in the wilderness, and his suffering in a dangerous and heathen place could be understood as expiation. Banishment was a punishment, a colonial labour policy, and a spiritual opportunity, all at once — and the participants did not experience these as being in tension.

This is the penance motif again, running in parallel, and it should be held in view because it shows that the redemptive reading of punishment was not a Quaker eccentricity. It was the common sense of Christendom. What differed was the technology.

Three — The Door Slams

And then, in 1776, the Americans declared independence, and **the outlet closed**.

England suddenly had a convict population, a sentencing practice built entirely around shipping them somewhere, and nowhere to ship them. The immediate expedient was the **hulks** — decommissioned warships moored in the Thames and at Portsmouth, into which convicts were packed to serve their sentences afloat, working the dockyards by day. The hulks were meant to be temporary. They were filthy, disease-ridden, and lethal, and they lasted eighty years.

Australia would eventually reopen the escape valve, from 1787. But in the interval — the crucial interval — England had a genuine penal crisis, an overflowing set of gaols and rotting hulks, and no answer.

It is into precisely this crisis that the reformers walked. The modern prison was not conceived in a moment of philosophical leisure. It was conceived in an emergency, and the emergency was created by the American Revolution.

PART V

The Enlightenment Hour: Beccaria, Howard, and a New Word

Two men supplied the intellectual materials, and neither of them was a penologist, because there was no such thing.

One — Beccaria: The Sentence as a Measured Quantity

In 1764 a young Milanese aristocrat named **Cesare Beccaria** published a short book, *Dei delitti e delle pene — On Crimes and Punishments* — which became one of the most influential works of the entire Enlightenment. It was translated everywhere, admired by Voltaire and Catherine the Great, and read closely by the American founders; both John Adams and Thomas Jefferson knew it.

Beccaria's arguments are now so thoroughly absorbed that their radicalism is invisible. He argued that punishment should be *proportional* to the offence; that its purpose is to *prevent* crime, not to avenge it; that **certainty** of punishment deters far more effectively than **severity**; and that torture and the death penalty are both barbarous and ineffective.

The crucial consequence for our story is the demand for **proportionality**, because proportionality requires a *scale*. If punishments must be graded to fit crimes of graded seriousness, then you need a punishment that comes in *units*. The lash comes in strokes, but flogging cannot be extended indefinitely without killing. Death has no units at all.

Time does. Time is infinitely divisible, precisely measurable, and can be administered in any quantity from a day to a life. Beccaria did not set out to invent the prison sentence. But once you accept his premise, the prison sentence is very nearly the only instrument that satisfies it.

Two — Howard: The Man Who Went and Looked

The second figure supplied not a theory but a *fact*, and the fact came from his position.

John Howard became High Sheriff of Bedfordshire in 1773, an office that carried nominal responsibility for the county gaol. Most sheriffs regarded this as ceremonial. Howard — a Nonconformist of severe conscience and, evidently, of a mind that could not leave an anomaly alone — actually went and inspected it.

What he found appalled him, and the specific thing that appalled him is a fine instance of position determining the field of the visible. He discovered that prisoners who had been **acquitted** were still held in gaol, because they could not pay the *gaoler's fee* — the gaoler being unsalaried and living off charges extracted from the prisoners. Men found innocent were imprisoned for the crime of poverty.

Howard then did the thing that made him: he spent the next seventeen years travelling England and Europe inspecting prisons, lazarettos, and hospitals — and in 1777 published *The State of the Prisons in England and Wales*, a work of remorseless empirical documentation. He catalogued the filth, the starvation (in many gaols there was no food allowance at all), the extortion, and above all **gaol fever** — typhus — which killed prisoners in numbers that dwarfed the gallows.

Howard's prescriptions were four: **salaried gaolers** (to kill the fee system), **sanitation**, **separation of prisoners by category**, and **solitary confinement at night** with labour by day.

Three — The Word Is Coined

In 1779, Howard, together with the jurist **William Blackstone** and the reformer **William Eden**, drafted and secured the passage of the **Penitentiary Act** — a statute that proposed to build state prisons on exactly these principles, in a country that had just lost its ability to transport convicts to America.

And it is this Act that gives the institution its name. The word **penitentiary** enters the English statute book here, carrying its meaning openly: a place designed to induce **penitence**.

The Act's prisons were never actually built in the form intended. But the design was now written down, and the word existed, and both crossed the Atlantic — where a religious sect was waiting that would take the theory of penitence far more literally than any Englishman had ever intended.

PART VI

The Quaker Hour: A Machine for the Soul

This is the architect's hour of the American penal system, and it is one of the purest in this entire collection — because the theology and the architecture correspond so exactly that one can read the doctrine off the floor plan.

One — The Formation

The Society of Friends — the Quakers — held a doctrine that was, in the seventeenth and eighteenth centuries, genuinely radical: the **Inner Light**. Every human being, they believed, without exception and regardless of station or wickedness, carries within them a spark of the divine — "that of God in everyone."

Two consequences follow, and both are load-bearing.

First: no one is beyond redemption. If God is *in* the criminal, then the criminal can be reached, and the purpose of punishment cannot be simply to destroy or deter him. This is why the Quakers were, from the start, opponents of capital punishment.

Second — and this is the part that becomes architecture — the Inner Light is heard in silence. The Quaker meeting for worship has no priest, no liturgy, and no sermon. Friends sit together in **silence**, waiting, until someone is moved by the Spirit to speak. Silence is not an absence in Quaker practice. **It is the instrument.** It is the condition under which the divine voice within becomes audible over the noise of the world.

Now put those two doctrines together and ask what follows for a criminal.

If God is in him, and if God is heard in silence, then **the way to reform a criminal is to put him in silence and leave him there** until the Inner Light does its work.

That is the design specification for solitary confinement. It is not a metaphor. It is the theory, and its authors stated it plainly.

Two — The Attempt, and the Instrument

The Quaker attack on the penal law began with **William Penn**, whose *Great Law* of 1682 for the colony of Pennsylvania abolished the death penalty for all crimes but murder and substituted **imprisonment at hard labour** — a century before England considered it. The Crown repealed it after Penn's death, restoring the Bloody Code. But the intention had been declared.

It returned after independence, and the vehicle was the **Philadelphia Society for Alleviating the Miseries of Public Prisons**, founded in 1787 — one of whose leading figures was **Dr Benjamin Rush**, signer of the Declaration of Independence, and the closest thing this story has to a named architect.

Rush, in a famous 1787 paper delivered at Benjamin Franklin's house, proposed replacing public punishment with a **"House of Repentance"** — an institution that would remove the criminal from the taverns, brothels, and gambling halls that he considered the true causes of crime, and place him in a "well ordered institution" that would encourage "proper habits of discipline and industry." Rush wanted the prisoner isolated so that nothing could reach him except his own conscience and the discipline of the institution.

In **1790** the Pennsylvania Assembly converted a wing of the **Walnut Street Jail** in Philadelphia into a "penitentiary house," with solitary cells for the more serious offenders. It is generally reckoned the first true penitentiary in the world — a prison whose *purpose* was reformation through solitude, not mere custody.

And in **1829**, the full theory was realised in stone: **Eastern State Penitentiary**, designed by John Haviland on a radial plan, seven cell blocks radiating from a central observation hub, at a cost that made it one of the most expensive buildings in America.

Three — The Machine, and What It Did to People

The regime at Eastern State was total, and every element of it is a theological proposition rendered in architecture.

The prisoner lived **alone**, in a cell with a small private exercise yard, so that he need never see another inmate. He was **hooded** when moved through the building, so that he could not see, or be seen by, another face. He worked **alone** in his cell. He had a **Bible**. Each cell had a single skylight — called, by the men who built it, the **"Eye of God."**

He was to have, in short, **nothing whatever to do but attend to his own soul.** That was the entire point.

The Quakers were sincere. This must be granted at full strength, because the horror of what followed is unintelligible otherwise. **This was designed as an act of mercy** — a humane alternative to the gallows, the lash, and the branding iron, by people who genuinely believed they were saving both the man's life and his soul, and who were, by the standards of their century, doing exactly that.

And it drove men mad.

The regime produced insanity, self-harm, and suicide, and the effects were noticed almost immediately. Charles Dickens visited in 1842 and left the judgment that has never been bettered. A prisoner, he wrote, sees the prison officers, but with that exception —

> *"he never looks upon a human countenance or hears a human voice. He is a man buried alive."*

Dickens, who was no sentimentalist about criminals, called the system a "slow and daily tampering with the mysteries of the brain" that was "immeasurably worse than any torture of the body."

This is the institution's logic in its most terrible form. The Quakers built a machine to let the Inner Light speak. What the machine actually did — because human beings are social animals whose minds require other minds to remain intact — was to destroy the very faculty it was designed to liberate. The theory was wrong about what a human being *is*, and the building was too well made to be forgiving of the error.

PART VII

The Ledger Wins

The Pennsylvania system had a rival, and the contest between them decided the character of American incarceration for the next two centuries. **The right side lost.**

One — Auburn

At Auburn, New York, in the 1820s, a different system emerged, associated above all with the warden **Elam Lynds**. Under the **Auburn system** — also called the *congregate* or *silent* system — prisoners were held in solitary cells **at night**, but brought together **by day** to work in **congregate workshops**, under a rule of enforced and total silence, enforced by the lash.

At the level of theory this looks like a compromise between the cell and the workshop. In practice it was something else, and the something else is what won.

Auburn prisoners worked in factories. They could be organised into production lines, put to contract labour for private manufacturers, and made to generate revenue. The Pennsylvania prisoner, alone in his cell with a handloom, could not.

Two — The Number That Decided It

The debate between the two systems was fierce, international, and conducted in the language of morality and human nature. It was decided by arithmetic.

The Pennsylvania system, in 1833, cost approximately **eighteen times as much per inmate** as the Auburn system.

That is the whole of it. Eastern State's cells were large (each prisoner needed a private yard and a workshop within his cell), the building was enormous, and the labour was unproductive. Auburn's cells were tiny (a man only slept in his), its workshops were efficient, and its contract labour generated income that could offset the cost of the prison — and in good years, *turn a profit*.

Every state legislature in America faced the same question, from the same position, with the same ledger in front of it: *we must build a prison; which model?* And every one of them, weighing an expensive machine for saving souls against a cheap machine that paid for itself, reached the same answer. **Auburn won across the United States.** Pennsylvania's system was more admired in Europe and more thoroughly rejected at home.

The method insists on the reading here, because it is exactly the pattern this project keeps finding. **No one decided that the American prison should stop being about redemption and start being about production.** There was no meeting, no manifesto, no moment of declared apostasy. There was a series of state legislatures, each solving a budget problem, each choosing the cheaper option for entirely defensible reasons — and the cumulative effect of those independent, rational, unremarkable decisions was to install *industrial labour* at the heart of the American prison and to relegate the *cure of souls* to the chaplain's office.

The purpose changed because the *cost structure* changed the answer. And the purpose that won was the one that could pay.

Three — The Two Frenchmen

A footnote that is not a footnote. In 1831 the French government dispatched two young magistrates to the United States to study its penitentiaries and report on whether the American models could be adopted in France. Their report, *On the Penitentiary System in the United States and its Application in France* (1833), was a serious and influential work.

The two magistrates were **Gustave de Beaumont** and **Alexis de Tocqueville**. *Democracy in America* was the by-product of a prison inspection tour.

That the most celebrated book ever written about American society exists because Europeans regarded the American penitentiary as the most interesting institution on the continent is a fact worth holding. **In 1831, the prison was America's great innovation, and the world came to look at it.**

PART VIII

The Exception

Now the hinge on which the entire modern American system turns — and the point at which this study must be at its most careful, because the popular account is *nearly* right, and the way it is wrong matters enormously.

One — The Clause

The Thirteenth Amendment, ratified in 1865, abolished slavery. Here is its operative sentence, in full, with the crucial clause emphasised:

> ***"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."***

Read it again. Slavery is abolished — **except as a punishment for crime.** The Constitution of the United States expressly permits involuntary servitude for convicts, and does so to this day.

Two — Where the Words Came From

The popular account — advanced in the documentary *13th* and in a great deal of activist writing — calls this clause a "poison pill," a "trapdoor," an "escape clause": a deliberate insertion by men who intended to preserve slavery under another name.

The framework rejects this reading, and it does so on the evidence, not out of charity.

The language was not invented in 1865. It was **copied**. The phrasing derives from the **Northwest Ordinance of 1787** — a document whose *purpose* was to prohibit slavery in the territories north of the Ohio, and which was regarded then and since as a landmark *antislavery* enactment. Its Article VI reads that there shall be neither slavery nor involuntary servitude in the said territory, "otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

The drafters of the Thirteenth Amendment reached for **existing, respected, antislavery boilerplate**, as drafters do — the same reflex this project has documented in the Statute of Anne, in the Standard Time Act, and in every founding text where later hands write their change into an authoritative predecessor. They took the most impeccable antislavery language available to them and used it.

This is not exculpation. It is something worse. A conspiracy would require conspirators, who could be named, blamed, and — crucially — *would have had to understand what they were doing*. What actually happened is that a clause with an innocuous history, inserted without controversy, was **lying there** when a set of people in a particular position discovered that it was worth an enormous amount of money.

That is the pattern this project has traced through the Academy Award and the Venetian bond: **the yield is discovered, not designed.**

Three — The Discovery

The position was this. In 1865, the Southern states possessed an agricultural economy built entirely on unfree labour, and that labour had just walked away. There was a labour crisis of existential proportions, and every planter, every legislator, and every sheriff in the South was staring at it from the same vantage, with the same problem, at the same time.

And there, in the new Constitution, sat a clause providing that a *convicted criminal* could be compelled to labour.

The rest followed with the automatic quality of water finding a channel. Southern legislatures passed the **Black Codes** in 1865–66 — laws criminalising, in effect, the condition of being Black and unemployed. Mississippi required Black residents to produce written proof of employment at the start of each year; leaving a job before the contract

expired meant forfeiting all wages and being subject to arrest. **Vagrancy** statutes were written so broadly that any Black person without a white employer's paper could be arrested at will.

Arrest produced conviction; conviction produced a convict; and the convict, under the exception clause, could be **leased**.

Convict leasing was the result: states leased their prisoners to private railroads, mines, lumber camps, brickyards, and plantations. The state collected the fee. The prisoner earned nothing. Roughly three-quarters of leased convicts were Black.

Four — Worse Than Slavery

And here the study must record the thing that is hardest to write, because it is a finding about incentives and it is exact.

Convict leasing was, by the measure of mortality, worse than slavery — and it was worse for a structural reason.

A slaveholder owned his slave as *capital*. A dead slave was a destroyed asset — a loss of hundreds or thousands of dollars. The slaveholder therefore had a direct financial interest, however monstrous the arrangement, in keeping the person alive.

A lessee of convicts owned nothing. He rented a man for a season. If the man died, the state simply sent another. He had *no capital at risk whatsoever*, and therefore no financial interest in the prisoner's survival — and every incentive to extract the maximum labour in the minimum time at the minimum cost.

The death rates were what that incentive structure predicts. In Texas alone, more than **3,500 prisoners died between 1866 and 1912** — the year the state finally abolished convict leasing, because the death toll had become impossible to defend. In 2018 a researcher located the remains of 95 Black prisoners who had died at Sugar Land, Texas; their estimated ages ran from **14 to 70**, meaning some had been born into slavery, freed, convicted, and forced back into unpaid labour before dying in it.

The historian **David Oshinsky** titled his study of the Mississippi system *Worse Than Slavery*. It is not rhetoric. **It is an incentive analysis, and it is correct.**

The plantation prison — Parchman in Mississippi, Angola in Louisiana, built on the grounds of a former slave plantation and named for the African country its slaves had come from — is the physical residue of this hour, and several of them are still operating.

Note what the framework says here, and what it refuses to say. It refuses to say there was a plot in 1865 to re-enslave Black Americans through the Constitution. And it insists, just as firmly, that what actually happened was in some ways *harder to remedy* than a plot would have been — because there was no conspiracy to expose, no cabal to indict, only a clause inherited from an antislavery document, a labour crisis, and several thousand men in similar positions, each reaching independently for the same lever, none of them needing to be told.

PART IX

The Rehabilitative Century, and the Sentence That Killed It

One — The Rehabilitative Ideal

From roughly the 1870s to the 1970s, American penology was governed by a single organising idea: that the criminal is a person who can be **diagnosed and cured**.

The apparatus built around this idea is worth naming, because all of it was later dismantled. The **reformatory** movement, beginning at Elmira, New York, in 1876 under Zebulon Brockway, introduced education, trades training, and — crucially — the **indeterminate sentence**: a prisoner was sentenced not to a fixed term but to a *range* (say, one to ten years), and released when the authorities judged him reformed. This required **parole boards** to make the judgment, and **probation** for those who need not be confined at all, and a **juvenile court** (Chicago, 1899) for children, who were understood to be reformable almost by definition.

The premise beneath all of it was that punishment should be tailored to the *offender*, not the offence — that the sentence should fit the man.

Two — The Article

In the spring of 1974, a sociologist named **Robert Martinson** published an article in *The Public Interest* titled **"What Works? — Questions and Answers About Prison Reform."** It reviewed 231 studies of rehabilitative programmes and reached a conclusion he stated in careful academic language:

> *"With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."*

It became known, instantly and forever, as the **"nothing works"** doctrine — a phrase Martinson himself flirted with, asking in the same article, "Does nothing work?"

And what happened next is one of the most instructive convergences in this entire collection.

Three — Left and Right, Converging From Opposite Directions

Martinson published essentially the same finding **twice**: in the conservative *Public Interest*, and in a four-part series in the liberal *New Republic*.

And **both sides embraced it — for opposite reasons.**

The left welcomed it because liberals and civil libertarians had come to detest the indeterminate sentence. It handed enormous, unreviewable, arbitrary power to parole boards, who released or held men on the basis of vague criteria like "attitude" — and in practice, the discretion fell along lines of race and class. In California, offenders were routinely given "day-to-life" sentences with release tied to a board's assessment of their character. If rehabilitation *didn't work*, then the whole apparatus of therapeutic discretion was an unjustifiable licence for state power over the individual, and it should be abolished in favour of **fixed, determinate, equal sentences.**

The right welcomed it because conservatives thought the whole rehabilitative enterprise was soft-headed and that criminals should simply be punished. If rehabilitation *didn't work*, then the case for coddling collapsed, and sentencing should be **fixed, determinate, and severe**.

Both sides therefore converged on the same reform: the abolition of indeterminate sentencing and the imposition of fixed terms. The left wanted fixed sentences to be *fair*. The right wanted fixed sentences to be *long*.

The legislatures gave them fixed. And then — because the political incentives on a legislature facing a rising crime rate run in exactly one direction — the legislatures made them **long**. Parole was abolished federally in 1984. Mandatory minimums followed. Three-strikes laws followed. Truth-in-sentencing followed.

The left got the fixed sentence and lost the discretion that had been the only mechanism for mercy. It is very difficult to find anyone who wanted the outcome that both sides jointly produced.

Four — The Architect Who Recanted

Martinson himself, examining better data, changed his mind. In 1979 he published a paper explicitly walking the conclusion back, noting that some treatments *did* reduce recidivism and cautioning against exactly the sentencing reforms his earlier work had been used to justify.

Nobody listened. The finding had escaped him. It had been absorbed into the political bloodstream of both parties, and it was serving too many people's interests, from too many positions, for a correction to matter.

Two further facts complete the portrait, and this project records them because they are the sharpest possible illustration of a structure outrunning its maker.

Robert Martinson had been a Freedom Rider. In 1961 he went south with the civil rights movement and was jailed in Mississippi — held, for a time, at Parchman Farm, the plantation prison of Part VIII. The man whose paper would help authorise the mass incarceration of Black Americans had been imprisoned, as a young activist, in the very system he later helped to unleash.

And in August 1979, the year of his recantation, **Robert Martinson threw himself from the window of his fifteenth-floor Manhattan apartment.**

He had written one article. It had done what he never intended, it could not be recalled, and it outlived him — which is what institutions do to the people who feed them.

PART X

The System With No Architect

One — What Everyone Blames

The standard account of mass incarceration names a familiar list of statutes: the Rockefeller Drug Laws (New York, 1973); the Sentencing Reform Act (1984), which abolished federal parole; the Anti-Drug Abuse Act (1986), with its notorious 100-to-1 disparity between crack and powder cocaine; California's Three Strikes law (1994); and the federal Violent Crime Control and Law Enforcement Act of 1994, which put billions into prison construction and conditioned the money on states adopting truth-in-sentencing.

All of this is real, and all of it mattered. The American incarcerated population, roughly 200,000 in the early 1970s, rose to well over two million — the highest incarceration rate in the world.

But the study now presses on the mechanism, and here the recent scholarship has produced findings that discomfort *every* political constituency, which is usually a sign that they are worth attending to.

Two — The Prosecutor

The legal scholar **John Pfaff**, in *Locked In* (2017), went to the data and found that the standard story — that mass incarceration is principally the product of the drug war and long sentences — does not fit the numbers. Most state prisoners are serving time for violent offences, not drugs; and time served, while it grew, did not grow enough to explain the scale of the increase.

What *did* change, dramatically, was the number of people being sent to prison in the first place. And the person who decides that is not the legislator, not the police officer, and not the judge.

It is the prosecutor.

Pfaff's central finding: between **1994 and 2008**, the number of felony cases filed rose from about **1.4 million to 1.9 million** in the states with reliable data — *while crime was falling and arrests were flat or declining*. Prosecutors were charging a far larger share of the people the police brought them. As Pfaff puts it, "the person driving up prison admissions is the prosecutor."

Now apply the framework, because the incentive structure is a textbook specimen.

There are roughly **three thousand** county-level chief prosecutors in the United States. Almost all are **elected**. And consider the ledger each of them faces from where they stand:

- **The benefit of charging aggressively is concentrated on him.** Convictions are his record. "Tough on crime" is his campaign. A single defendant released who then commits a terrible crime can end his career; no one has ever lost an election for prosecuting too many people.
- **The cost of imprisonment is borne by someone else entirely.** The county elects the prosecutor and pays for the courthouse; **the state pays for the prison cell.** The man who fills the bed does not pay for the bed.
- **And he is essentially unsupervised.** Prosecutorial discretion is close to unreviewable; most prosecutors run unopposed.

This is the purest position-logic structure in the entire collection. Concentrated benefit, diffuse cost, no monitoring. Three thousand people, in three thousand separate offices, in fifty states, who have never met, do not coordinate, and are not conspiring — each doing the rational thing from where he stands. And the aggregate of their independent, individually defensible decisions is **the largest prison population in the history of the world.**

There is no meeting. There is no cabal. **There is an incentive gradient, and three thousand people standing on it.**

Three — The Finding That Breaks the Conspiracy Reading

And then a second body of work, which must be included precisely because it is uncomfortable.

James Forman Jr., in *Locking Up Our Own* (2017) — which won the Pulitzer Prize — went to Washington, D.C., where he had worked as a public defender, and documented something the simple racial-conspiracy account cannot absorb: **Black political leaders, Black judges, Black prosecutors, and Black community organisations frequently supported the tough-on-crime measures** that filled the prisons with Black defendants.

Forman's explanation is not betrayal and it is not false consciousness. **It is position.** Black communities in the 1970s and 1980s were being devastated by heroin, then crack, then gun violence — and they were being devastated *at rates far higher than white communities*. Black residents were the *victims*. They demanded protection, and they demanded it urgently, because their children were dying. The officials who answered them were responding to a real and terrible problem in front of them, with the materials the state actually offered — which were police, prosecution, and prison, because the jobs, housing, and treatment they also asked for were never funded.

Forman describes a Black judge in D.C. lecturing a young Black defendant about Martin Luther King before locking him up.

No conspiracy can explain that man. Position can, and does. He was doing what he believed was right, for his community, from where he stood.

Four — The Convergence, Complete

So assemble the whole mechanism, and notice that at no point does it require anyone to have wanted the outcome.

A **Roman rule** that prison is not punishment, preserved by Justinian's lawyers for reasons of legal scholarship.

- A **Church** forbidden to kill, which invented penitential confinement to punish without blood.
- A **Tudor state** with a vagrancy problem and a spare palace, which invented the workhouse.
- An **American Revolution** that closed England's convict dump and forced the invention of the prison.
- **Quakers** who built a machine to let God speak in the silence, and drove men insane.
- **State legislatures** that chose the cheaper prison, and thereby made American incarceration industrial.
- A clause **copied from an antislavery ordinance**, which a broken Southern economy found lying there and turned into convict leasing.
- A **Freedom Rider's article** that the left and the right embraced for opposite reasons, destroying rehabilitation and clearing the way for the fixed, long sentence that neither of them, separately, had wanted.
- And **three thousand elected prosecutors**, each rationally maximising a career against costs paid by others.

Not one of these people set out to build the world's largest prison system. Each was solving the problem in front of him, with the materials at hand, within the field his position let him see.

PART XI

The Ledger

Both columns, in ink.

In the column of the real achievements — and they are real, and forgetting them is how the horror of the present becomes unintelligible: the prison was invented as an act of *mercy*. It replaced a system that hanged children for theft, that flogged, branded, mutilated, and displayed the bodies of the punished for public entertainment. Beccaria and Howard and Rush and the Quakers were not monsters; they were, by the lights of their century, humanitarians, and they were *right* that the gallows and the branding iron were barbarous. The graduated sentence — punishment measured in time, proportioned to the offence, applied without torture — is a genuine moral achievement of the Enlightenment, and no one proposing to abolish it has ever explained what should replace it. **The prison is what a civilisation invented when it decided to stop killing people.**

In the column of the costs, held at equal strength: that same instrument now holds roughly two million people, at the highest rate on earth; it incarcerates Black Americans at several times the rate of white Americans; it evolved directly out of, and was for decades continuous with, a regime of forced labour whose death rates exceeded those of chattel slavery; it still permits compelled labour by constitutional text; and its central technology — solitary confinement — was known to destroy the human mind within a decade of its invention, was condemned by Dickens in 1842 as worse than any torture of the body, and **is in wider use in the United States today than it was in 1842.**

And the deepest cost is the one this project keeps arriving at, and it is not a cost that can be paid by finding the guilty. **There is no one to remove.** The Quakers are dead; the legislators who chose Auburn were solving a budget problem; the drafters of the exception clause were copying an antislavery ordinance; Martinson recanted and then jumped; and the three thousand prosecutors are each doing, from where they stand, precisely what any of us would be *rewarded* for doing in their place.

The case resolves, as this project's cases tend to, against both easy pictures and into the harder one between them. It was not a conspiracy — no cabal designed American mass incarceration, and the clause that made convict labour constitutional was lifted, in good faith, from a document written to *abolish* slavery. Nor was it an accident of impersonal forces — every step was taken by real people, intentionally, and most of them skewed their step toward their own position exactly as the framework predicts. **It was an architect's hour, and then another, and then another — each one solving a real problem, each one handing its solution to an institution that ran forward on a logic no architect chose, and each new generation inheriting an apparatus built for a purpose that no longer existed and putting it to a use its makers never imagined.**

The cell was built to let a man hear God. It was kept because it was cheap. It was filled because a clause permitted it and a labour market wanted it. It was justified because a sociologist said nothing worked. And it is filled *today* because three thousand people, whose names you do not know, each get a promotion for filling it and never see the bill.

Held, like everything in this project, as tested, not revealed.

A Note on Sources

Every quotation is verified to a published source; none is invented.

On the Roman position. Ulpian's rule is at Justinian's *Digest* 48.19.8.9 (*Ulpianus libro nono de officio proconsulis*): *"carcer enim ad continendos homines, non ad puniendos haberi debet"* — "for a prison ought to be employed for the confining of men, not for the punishing of them" — with the surrounding passage establishing that governors who imposed imprisonment as a sentence were acting *ultra vires*, "because such punishment is prohibited." The standard modern discussion is Andrea Lovato, *Il carcere nel diritto penale romano* (Bari, 1994). Foucault cites the same passage in *Discipline and Punish* to mark the boundary between ancient custodial and modern punitive incarceration.

On the ecclesiastical invention of penitential confinement. Julia Hillner, *Prison, Punishment and Penance in Late Antiquity* (Cambridge University Press, 2015), is the leading study, and argues that forced monastic penance emerged as a Roman legal penalty by the sixth century — running counter to the older consensus that Roman legal principle never acknowledged corrective punitive confinement. On the etymology and the theological content of "penitentiary," see the standard histories of the prison.

On the houses of correction. The grant of Bridewell Palace by Edward VI to the City of London in 1553, its conversion into a house of correction, and the subsequent statutory requirement that counties maintain bridewells, follow the standard English social and legal histories; on the Amsterdam Rasphuis (1596) and its influence, see the literature on the Dutch workhouse movement.

On transportation and *degredo*. The Transportation Act of 1718 and the estimate of roughly fifty thousand convicts transported to the American colonies follow the standard scholarship (notably A. Roger Ekirch, *Bound for America*). On the Portuguese *degredo* and *degredados*, see the scholarship on Portuguese penal exile and its redemptive framing. The closure of American transportation after 1776, the resort to the prison hulks, and the resulting penal crisis are documented throughout the English prison-history literature.

On the Enlightenment reformers. Cesare Beccaria, *Dei delitti e delle pene* (1764). John Howard, *The State of the Prisons in England and Wales* (1777); Howard's appointment as High Sheriff of Bedfordshire in 1773, his discovery that acquitted prisoners were held for gaoler's fees, and his seventeen years of inspection tours until his death in 1790 follow the standard biographical record and the summary in Lecky's *England in the Eighteenth Century*. The Penitentiary Act of 1779, drafted with William Blackstone and William Eden, is the statutory origin of the English word *penitentiary*.

On the Quaker system. William Penn's *Great Law* (1682) and its repeal after his death; the Philadelphia Society for Alleviating the Miseries of Public Prisons (1787); Benjamin Rush's proposal for a "House of Repentance," including his contention that criminals "had to be removed from society and placed in a House of Repentance," and his call for a "well ordered institution" encouraging "proper habits of discipline and industry"; the conversion of the Walnut Street Jail into a penitentiary house in 1790; and the opening of Eastern State Penitentiary in 1829 on John Haviland's radial plan — all follow the *Pennsylvania Heritage* treatment, "Punishment, Penitence, and Reform: Eastern State Penitentiary and the Controversy Over Solitary Confinement," and the standard histories. The Quaker doctrine of the Inner Light as the theological basis of the separate system — that God endowed every person with "an inner light of goodness" and that the Friends sought to "answer that of God" in criminals — follows the same source.

On Dickens. Charles Dickens visited Eastern State in 1842; the judgment that a prisoner "never looks upon a human countenance or hears a human voice — he is a man buried alive," and his description of the system as a "slow and daily tampering with the mysteries of the brain," are from *American Notes for General Circulation* (1842).

On Auburn and the cost comparison. The Auburn congregate/silent system under Elam Lynds and its contract-labour economics follow the standard histories. The finding that the Pennsylvania system cost approximately eighteen times as much per inmate as the Auburn system in 1833 is reproduced in the penological literature. Gustave de

Beaumont and Alexis de Tocqueville, *Du système pénitentiaire aux États-Unis et de son application en France* (1833), was the official report of their 1831 mission.

On the Thirteenth Amendment. The text is quoted from the ratified amendment. The derivation of the exception language from Article VI of the Northwest Ordinance of 1787 ("otherwise than in the punishment of crimes whereof the party shall have been duly convicted") is noted in the constitutional literature and in the critical scholarship on the "loophole" reading, including the African American Intellectual History Society's assessment of the documentary *13th*. On the Black Codes, convict leasing, and the incentive structure that made lessees indifferent to prisoner survival, see David Oshinsky, *"Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (1996), and Douglas A. Blackmon, *Slavery by Another Name* (2008). The figure of more than 3,500 prisoner deaths in Texas between 1866 and 1912, the abolition of Texas convict leasing in that year, and the 2018 discovery of 95 bodies at Sugar Land (ages estimated 14 to 70) follow the reporting collected by *History* and the *Washington Post*.

On the collapse of rehabilitation. Robert Martinson, "What Works? — Questions and Answers About Prison Reform," *The Public Interest* (Spring 1974), including the conclusion that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." His parallel four-part series in *The New Republic*, and the resulting embrace of the finding by both left and right for opposing reasons, are documented in the retrospective literature (see the Prison Policy Initiative's summary and Cullen and Gilbert, *Reaffirming Rehabilitation*). His recantation is Robert Martinson, "New Findings, New Views: A Note of Caution Regarding Sentencing Reform," *Hofstra Law Review* 7 (1979). His participation in the 1961 Freedom Rides and his imprisonment in Mississippi, and his death by suicide in August 1979, follow the biographical record.

On the modern drivers. John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (Basic Books, 2017), for the finding that felony filings rose from roughly 1.4 million to 1.9 million between 1994 and 2008 in the states with reliable data while arrests were flat or falling, and for the argument that "the person driving up prison admissions is the prosecutor"; Pfaff also documents that prosecutors reap the political benefits of incarceration while the costs are borne by state budgets. James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2017; Pulitzer Prize), for the role of Black officials and communities in supporting tough-on-crime measures. See also Elizabeth Hinton, *From the War on Poverty to the War on Crime* (2016); Naomi Murakawa, *The First Civil Right* (2014); Michelle Alexander, *The New Jim Crow* (2010), whose "standard story" Pfaff explicitly contests; and David J. Rothman, *The Discovery of the Asylum* (1971).

Contested matters are flagged as such, and this field contains real and serious disputes. Pfaff's prosecutorial thesis is itself contested, and the relative weight of drug enforcement, sentence length, prosecutorial charging, and violent-crime rates in producing mass incarceration remains an active scholarly argument; this study rests only on the well-supported points that charging rates rose sharply while arrests did not, and that prosecutorial discretion is largely unmonitored. Likewise, the "poison pill" reading of the Thirteenth Amendment's exception clause is widely held and is rejected here on the documentary evidence of the clause's Northwest Ordinance provenance — but the *consequences* of the clause, which are not in dispute, are recorded in full. Where the study errs, it should err visibly, in a form the cited scholarship can correct.

Part of the collection *Patterns of Power*. **Tested, not revealed.**